PD-0344-17
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 11/13/2017 3:04 PM
Accepted 11/13/2017 4:02 PM
DEANA WILLIAMSON
CLERK

NO. PD-0344-17

IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
11/13/2017
DEANA WILLIAMSON, CLERK

THE STATE OF TEXAS **APPELLANT**

V.

JOEL GARCIA **APPELLEE**

THE STATE'S BRIEF ON APPELLEE'S PETITION FOR DISCRETIONARY REVIEW

FROM THE COURT OF APPEALS, EIGHTH DISTRICT OF TEXAS
CAUSE NUMBER 08-15-00264-CR,
TRIAL COURT CAUSE NUMBER 20150D00100
210th DISTRICT COURT OF EL PASO COUNTY, TEXAS

JAIME ESPARZA
DISTRICT ATTORNEY
34th JUDICIAL DISTRICT

LILY STROUD
ASST. DISTRICT ATTORNEY
DISTRICT ATTORNEY'S OFFICE
203 EL PASO COUNTY COURTHOUSE
500 E. SAN ANTONIO
EL PASO, TEXAS 79901
(915) 546-2059 ext. 3769
FAX (915) 533-5520
EMAIL lstroud@epcounty.com
SBN 24046929

ATTORNEYS FOR THE STATE

The State requests oral argument.

TABLE OF CONTENTS

INDEX OF AUTHORITIES

FEDERAL CASES

STATE CASES

OUT-OF-STATE CASES

CONSTITUTIONS AND STATUTES

RULES

REFERENCE MATERIALS

STATEMENT OF THE CASE

Joel Garcia, appellee, was indicted for three counts of intoxication manslaughter for the deaths of Joshua Deal (Count I), Isaiah Deal (Count II), and Shannon Del Rio (Count III) and one count of possession of less than one gram of cocaine (Count IV). (CR1:8-11).[1] After holding several hearings on Garcia's pretrial motion to suppress the results of a warrantless blood-draw, (CR1:81-83); (CR2:397-99); *see generally* (RR2:4-189); (RR3:4-221); (RR4:5-10); (RR5:5-101); (RR7:11-56), the trial court orally granted Garcia's suppression motion, (RR7:56, 95, 107-08, 124), signed a written order granting the suppression motion on July 23, 2015, (CR:587), and, over two separate hearings, issued oral findings of fact and conclusions of law. (RR7:95-109, 124); (RR8:4, 9-15).[2] The State timely appealed the trial court's pretrial order granting Garcia's suppression motion. (CR2:608-09).

On February 24, 2017, in an unpublished opinion, the Eighth Court sustained the State's sole issue presented for review, reversed the trial court's

---

[1] Throughout this brief, references to the record will be made as follows: references to the two-volume clerk's record will be made as "CR" and volume and page number, references to the nine-volume reporter's record will be made as "RR" and volume and page number, and references to exhibits will be made as either "SX" or "DX" and exhibit number.

[2] Garcia's pretrial motion to suppress his statements, also litigated during these hearings, is not at issue in this appeal. (CR1:84-86); (CR2:394-96).

suppression order, and remanded the case for trial. *See State v. Garcia*, No. 08-15-00264-CR, 2017 WL 728367 (Tex.App.–El Paso, Feb. 24, 2017, pet. granted) (not designated for publication). Specifically, the Eighth Court held that the warrantless blood-draw was constitutionally valid because of the existence of exigent circumstances that made obtaining a warrant impracticable. *See Garcia*, 2017 WL 728367 at *9-12.

This Court granted Garcia's PDR on two grounds: (1) "The court of appeals erred by applying a *de novo* standard of review to the trial court's granting of Appellee's motion to suppress evidence, failing to give 'almost total deference' to the trial court's findings of fact to support its conclusion that no exigent circumstances existed," and (2) "The court of appeals erred by considering evidence that did not become known to law enforcement until after the warrantless taking of Appellee's blood."

STATEMENT OF FACTS

At approximately 1:46 a.m. on Christmas Eve, December 24, 2014, first responders with the El Paso Fire and Police Departments (EPFD and EPPD) were dispatched to the scene of a fiery car crash at the intersection of Joe Battle Boulevard and Vista Del Sol. (RR2:20-22); (RR3:71); (RR5:23); (SX1–EMS records);[3] (SX26:6–Codes on CAD and I-net dispatch record). Arriving between 1:52 and 1:55 a.m., EPPD Officer Steven Torres observed a "hectic" and "chaotic" scene, (RR3:71); (SX26:6), in which two vehicles were engulfed in fire; EPFD and EMS units, along with numerous bystanders and civilian vehicles, were present; and the sounds of emergency-vehicle sirens, burning cars, and people's voices were causing a great deal of noise. (RR3:71-72). EPFD was still attempting to extinguish the burning cars, and EMS was administering CPR to one of the victims. (RR3:121-22). Off. Torres's initial duties included controlling the crowd of bystanders, separating witnesses, and obtaining vehicle information. (RR3:72, 88).

Arriving at about the same time as Off. Torres, 22-year-veteran Off. Andres Rodriguez, currently assigned to the EPPD DWI task force, similarly observed a

[3] Although the parties and witnesses use the abbreviations EMS and FMS (Fire Medical Services) interchangeably, the State will hereafter use the abbreviation EMS when referring to emergency medical personnel and their records.

"hectic" scene in which officers were trying to control traffic, two vehicles were on fire, and people were walking around the crash scene. (RR3:147-48, 154); (SX14–dash-cam video showing that Off. Rodriguez arrived at 1:52 a.m.). Although another officer presented Garcia to Off. Rodriguez as "the driver,"[4] and Off. Rodriguez believed that Garcia, who had bloodshot eyes, the odor of alcohol, and slurred speech, was intoxicated, he did not, at that time, know who had caused the crash or how many people were involved. (RR3:155-56, 158-59, 181); (RR5:71-73).

When questioned by Off. Rodriguez in his patrol car, Garcia, who seemed dazed, kept telling implausible stories–*i.e.*, that no car collision had even occurred–and denying that he had been driving, forcing Off. Rodriguez to confirm with an eyewitness that Garcia had been driving the vehicle that struck the victims' vehicle. (RR3:156-60, 181-83, 185). Confronted with the fact that witnesses had identified him as the driver, Garcia, while simultaneously blaming the victims for causing the crash, finally admitting to being the driver and having "...about three or four beers." (RR3:160-61, 186, 198, 220). Off. Rodriguez

[4] Garcia was handcuffed because he might have tried to flee the scene. (RR3:156, 182, 184).

administered *Miranda* warnings to Garcia at approximately 2:20 a.m. (RR3:161, 198-99, 203-06); (SX14).

Although Off. Rodriguez had intended to take Garcia to the Pebble Hills Regional Command police station (PHRC) for further questioning and to see if Garcia's right-leg limp improved enough for him to perform standard-field-sobriety tests, (RR3:164-65), he was unable to do so because EMS, as well as an EPFD lieutenant, told him (Off. Rodriguez) that due to the "mechanisms of the crash," they were required to transport Garcia to the hospital for evaluation, even though Off. Rodriguez believed that Garcia stated that he did not want to go. (RR3:164-65, 186). While Garcia was still in the back of Off. Rodriguez's patrol car, Off. Torres observed Garcia moaning and wincing in pain. (RR3:73, 124).

Initially arriving at approximately 2:32 a.m., EPFD paramedic Jose Cavazos observed that the car fires had been extinguished. (RR2:21-22); (SX1); (SX26:14–showing that Cavazos's unit, R33, arrived at 2:32 a.m.). Because Garcia had wanted to get "checked out," Cavazos and Adrian Palomo, a then-paramedic student with EPFD, met with Garcia, who appeared, among other things, "...a little dazed and confused" and complained of foot pain. (RR2:22-24

55, 60-61).[5] While Cavazos did not see any obvious, external life-threatening injuries, he typically exercised precaution and assumed that a patient might have internal injuries that would not be revealed until further diagnostic testing at the hospital. (RR2:23-25, 50). Although Garcia was initially reluctant to go to the hospital, it did not take much to change his mind, and once Garcia requested to go to the hospital to be checked out, Cavazos was not allowed to deny him transport. (RR2:24, 26, 28, 61).

Paramedics then assisted Garcia, who was hopping and favoring his left leg, onto a backboard and immobilized his neck with a C-collar, (RR2:24-25, 62; (RR3:73-74), and, based upon the severity of the car crash and damage to the vehicles, which was severe and extensive, and the potential for Garcia to have life-threatening injuries, Garcia was transported to the trauma center at Del Sol Hospital as a Level II trauma patient. (RR2:26-29, 34-35, 40-41, 62-65). Because Garcia had already refused to provide a blood specimen, Off. Rodriguez, knowing that he needed a search warrant, left between 2:40 and 2:45 a.m., before Garcia's ambulance left the scene, to prepare a search warrant at the PHRC and, once the

[5] On cross-examination, defense counsel suggested that Garcia's dazed and confused appearance was indicative of a latent traumatic brain injury or internal injuries, sustained in the "traumatic, terrible auto accident," that could not be ruled out without diagnostic testing at the hospital. (RR2:33, 35-39).

crash scene was "semi under control," Off. Torres was instructed to accompany Garcia to the hospital and to notify Off. Rodriguez if medical personnel attempted to administer an I.V. or medications to Garcia. (RR3:73, 90, 96, 111, 138-39, 166-67, 187); (RR5:23-24, 40-43, 50); (SX26:15–dispatch recordings showing that Off. Rodriguez left the scene and was en route to the PHRC at 2:43 a.m.).

Off. Rodriguez explained that he asked Off. Torres to notify him if medical personnel attempted to administer an I.V. or medications to Garcia because he knew, based on his training and experience as a DWI and drug-recognition officer and studying what types of drugs could affect blood-alcohol concentration (BAC), that intravenous solution dilutes BAC and that some medications could either increase or decrease BAC, and he wanted to preserve the most accurate BAC as close in time to the crash as possible. (RR3:168-69). When Off. Torres expressed concern because he had not requested a blood-draw before, Off. Rodriguez told him that he would meet him at the hospital after obtaining a search warrant. (RR3:167-68).

The ambulance carrying Garcia left the scene at approximately 2:46 a.m. (RR2:29-30, 68-69); (RR3:73, 90-91, 125, 131, 166); (SX26:16–dispatch records showing that R33 left the scene to transport Garcia to Del Sol at 2:46:51). Although Level II trauma patients typically received advanced life care on the way

to the hospital, which included intravenous therapy, an EKG, and possibly medication–administered intravenously–if the severity of the patient's pain compromised his vitals, (RR2:26-29), Garcia, though having requested to go to the hospital, refused to allow paramedics in the ambulance to treat him with an I.V. or an EKG, but allowed them to check his vitals and perform a full head-to-toe injury assessment. (RR2:28, 48, 53, 63-64, 67). The ambulance arrived at Del Sol at 3:01 a.m. (RR2:30); (SX1); (SX26:18).

Phone records corroborate Off. Rodriguez's unsuccessful attempt, at 2:40 and 2:46 a.m., to enlist the assistance of another officer to expedite the warrant process, but that officer was already assisting with another arrest. (RR5:17-18, 50); (SX25). At 2:53 a.m., Off. Rodriguez arrived at the PHRC, the closest police station to Del Sol, located at 10780 Pebble Hills. (RR3:169); (RR5:24, 44); (SX26:18).[6] Familiar with the requirements for obtaining blood-draw search warrants, having prepared 50-60 search warrants, mostly on routine DWIs, Off. Rodriguez described the process of preparing the search-warrant affidavit and explained that it routinely took approximately 30-45 minutes to draft a search warrant–and an arrest-warrant affidavit because the magistrates required it; that

[6] Off. Rodriguez later corrected his initially mistaken testimony that he arrived at the PHRC at 2:40 a.m. (RR3:170); (RR5:24).

once he arrived at 810 East Overland,[7] where the magistrates were located, he would try to expedite the process by letting the magistrate know that he needed a search warrant signed; and that it typically took a magistrate 20-30 minutes to review and sign the search and arrest warrants. (RR3:148-52, 178); (RR5:53).[8]

And contrary to the Eighth Court's mistaken assertions that "...warrants could be obtained by phone" and that Off. Rodriguez "...testified that El Paso County warrant procedures permitted officers to obtain a warrant over the phone," *see Garcia*, 2017 WL 728367 at *1, 8, Off. Rodriguez unequivocally testified that El Paso County *does not* have any expedited warrant process by which warrants

---

[7] This Court may take judicial notice that the distance between the PHRC at 10780 Pebble Hills and 810 East Overland is 13.6 miles and that covering that distance, even at a hypothetically unrealistic sustained speed of 100 miles-per-hour that does not account for the time needed for Off. Rodriguez to get in and out of his patrol car and slow down at intersections, would have taken at least 8 minutes (time (hours) = distance (miles)/speed (mph)). *See Barton v. State*, 948 S.W.2d 364, 365 (Tex.App.–Fort Worth 1997, no pet.) (an appellate court may take judicial notice of geographical facts); *Drake v. Holstead*, 757 S.W.2d 909, 910 (Tex.App.–Beaumont 1988, no pet.) (holding that courts may take judicial notice of natural forces as well as the primary laws of physics, mechanics, and mathematics and that a fact is generally known even though it has to be processed with commonly possessed mental skills); *see also* TEX. R. EVID. 201.

[8] Throughout the suppression hearings, the trial court engaged in extensive examination of the State's witnesses, propounding no less than 200 leading, argumentative, and oftentimes adversarial questions, *see generally* (RR2:95-96, 131-36, 172-89); (RR3:117-42, 198-219); (RR5:51-66, 95-98), engaged in oftentimes argumentative and speculative commentary, and took the unusual actions of, among other things, calling its own witnesses, after both parties had already rested, improperly instructing the parties' attorneys not to speak to a prospective witness prior to her testimony, and introducing and admitting its own exhibit in evidence. (RR4:5-8, 10); (RR5:5, 9-10, 58, 101, 162); (RR6:8-9). Because the State did not object, the trial court admitted EPPD search-warrant templates as an exhibit for the State. (RR6:26-27, 34, 68-70); (SX28).

may be obtained by telephone, fax, or email,[9] and he had never heard of an officer obtaining a warrant in El Paso County without a face-to-face meeting with a magistrate. (RR3:152-54); (RR5:31-32).

At the PHRC, Off. Rodriguez initially verified Garcia's identification, since Garcia provided only his name and date of birth at the scene, learned that Garcia was already in the system for a prior DWI arrest, and then called other officers for the identification of the victim who died en route to Del Sol,[10] as well as witness and vehicle information. (RR3:170-72, 214); (RR5:18-19, 48-49); (SX25). Off. Rodriguez then attempted to set out sufficient facts, based on his own recollection and information from other officers investigating the scene, to satisfy a magistrate that probable cause existed to sign both an arrest and search warrant for Garcia's blood-draw. (RR3:173-74). Off. Rodriguez disagreed with the trial court's suggestion that he could have prepared both warrants in 10-15 minutes and explained that even if he had just used facts for a simple DWI offense, it would still take approximately 30-40 minutes to prepare both warrants. (RR3:198-201, 208-11, 213-14); (RR5:51-55). Although Off. Rodriguez had not yet ascertained

---

[9] And Off. Rodriguez did not believe that any of the magistrates would have recognized his voice over the phone. (RR3:152-53).

[10] Off. Rodriguez knew that he would not be able to get the identification of the burned victims at that time. (RR3:171).

which magistrate was on duty, he surmised that one would be available. (RR3:178); (RR5:29-30, 66).

At 3:06 a.m., 13 minutes after Off. Rodriguez arrived at the PHRC, Garcia was admitted into the ER at Del Sol. (RR2:105-06); (SX2). Elsie Andrade, an ER trauma nurse, explained that a Level II trauma patient like Garcia was someone who had been in such a serious crash that there existed the potential for serious internal, non-visual injuries that were not immediately apparent. (RR2:75-79). Nurses recalled Garcia complaining of pain. (RR2:92); (RR3:64). Standing near the curtain by Garcia's bed, Andrade was ready with the equipment to administer an I.V.–a routine ER procedure primarily used to replenish volume–on a metal tray, which included the needle (an Angiocath), a saline lock (piece of tubing attached to the Angiocath), a saline flush, tubing for the blood, Tegaderm tape, and a tourniquet. (RR2:82-83, 88, 90-91, 93).

Andrade was aware that officers–standing approximately 10-12 feet from Garcia's bed–were nearby, and while she did not know if they could hear her, she knew her actions were visible to them. (RR2:83, 93-95). And although Andrade ultimately did not start the I.V., she came very close to doing so:

[Andrade]: I did get close. I started to...look through the arm to see where I could start the I.V.

[State]: Are you holding – can you describe that for us? Are you holding his arm?
[Andrade]: Yes.

* * *

[Andrade]: I touch certain areas to see where I could feel a vein, see where I could start an I.V.... (RR2:84-85).

Andrade agreed on cross-examination that all she was going to do at that time was a saline flush, but reiterated that "I was there where I was going to start the I.V., but I never actually did start it." (RR2:90-91). Andrade explained that, in addition to a saline flush, medications, fluids, and a blood transfusion could be administered through the I.V. (RR2:88-92).

On the trial court's examination, Andrade explained that the curtain around Garcia's bed was not drawn and that the officers could see what she was doing:

[Court]: They were seeing everything that was being done?
[Andrade]: They could possibly be seeing.
[Court]: From where they were at, based upon what you were able to see, they were able to see what you guys were doing?
[Andrade]: Uh-huh.
[Court]: You could see them?
[Andrade]: Yeah.

(RR2:94-95). Andrade related that after Garcia had been in the ER for approximately 5-10 minutes, the decision was made that Garcia would have scans performed on him, but not an I.V., and that she left afterwards without conveying that information to the officers. (RR2:83, 85, 90-91, 93, 97, 99-100).

When Dr. Gary Kavonian, a Del Sol ER physician, first met with Garcia, he observed nurses standing next to Garcia with an I.V. bag and I.V. equipment on a stainless-steel stand, preparing to start an I.V.–a routine ER procedure–and draw blood, but he delayed the administration of the I.V. *at that time* because Garcia was being uncooperative and told the nurses that he did not want an I.V. (RR2:108, 110-11, 113-14, 118, 120-23, 128-29, 131-35). Dr. Kavonian repeatedly explained to the trial court that he never stated that "...there was no need" for an I.V., but that because Garcia was being so uncooperative and combative, he (Dr. Kavonian) "...felt it probably best for the staff and the patient to *avoid the I.V. at the moment*." (RR2:132-33, 135) (emphasis added).

Dr. Kavonian explained that fluids, pain medications, sedatives, and medications to anesthetize a patient in order to intubate him could be administered through the I.V. (RR2:117-18). When asked if those things could compromise a person's BAC, Dr. Kavonian indicated that saline solution could probably dilute any solute in the blood and would dilute BAC. (RR2:118). Dr. Kavonian opined that a person who saw the I.V. bag could reasonably conclude that an I.V. would be administered: "...if there's an I.V. bag up on the–hanging and there's equipment, then they could assume that too." (RR2:128-30).

While Dr. Kavonian recalled seeing officers outside the curtained area of Garcia's bed, he did not communicate with any of them about Garcia's treatment, including whether Garcia would ultimately receive an I.V., (RR2:111-13, 135-37), and he agreed that it would have been absurd and unprecedented for an officer to enter the treatment area, stop medical personnel, and question them regarding a patient's treatment. (RR2:137-38). Although Garcia, who complained of foot pain, was initially reluctant to have his foot x-rayed, he ultimately submitted to a CT scan of his cervical spine and brain, which Dr. Kavonian ordered out of concern that Garcia, who had bruising on his head, might have sustained an internal head injury, and he also submitted to x-rays of his chest, pelvis, and right ankle. (RR2:119-21); (SX2). Garcia's CT scans, for which Garcia was removed from the ER, were taken at 3:28 a.m. (RR2:123-25); (RR3:19-20, 24, 26-28); (SX2).

Thirty-seven-year veteran EPPD Off. Raul Lom, who at the time was assigned to the DWI task force and had conducted about 9,000 DWI investigations over a 30-year span, was moonlighting as a security officer at Del Sol when Garcia was brought in as a Level II trauma patient. (RR2:141-46, 152, 158). Standing about 10 feet away from Garcia's bed, Off. Lom could not hear the conversation between Garcia and one of the nurses who was holding an I.V. bag–which Off.

Lom recognized from his years-long experience (since 2003) working off-duty at the hospital–and saw Garcia shaking his head, "no." (RR2:146-48, 161). Off. Lom testified that over his many years working at the hospital, he had seen patients initially refuse medical treatment, as Garcia appeared to be doing at first, but eventually change their minds and receive medical treatment. (RR2:152).[11]

Having already learned about the fatal crash from other officers[12] and the fact that Off. Rodriguez was preparing a warrant, Off. Lom called Off. Rodriguez to express his concern that the administration of an I.V. to Garcia was imminent. (RR2:148-52, 157, 184); (SX26:12). Off. Lom knew that after preparing the search warrant, Off. Rodriguez would still need another 15 minutes to drive downtown to find a magistrate and that the magistrate usually on duty, if he was there on Christmas Eve, usually took his lunch hour between 3:00 and 4:00 a.m. (RR2:153-55).[13]

---

[11] Off. Lom's hunch that Garcia would stop resisting medical treatment proved correct since, as the record reflects, Garcia was ultimately examined by Dr. Kavonian and submitted to diagnostic testing.

[12] One of the crash victims was also transported to Del Sol's ER. (RR2:76-77, 87, 148).

[13] Although Off. Lom calculated another 10 minutes for Off. Rodriguez to take the signed warrant to Del Sol, he later agreed that Off. Rodriguez could tell officers at the hospital by phone that the warrant had been signed. (RR2:154, 185-86).

Off. Lom testified that he and Off. Rodriguez decided to perform a warrantless blood-draw–based on exigent circumstances since mandatory blood-draws were no longer permissible–because Off. Lom was "...very certain that any moment it could happen that he would be injected with an I.V.," and Garcia might later claim that the I.V. contaminated the blood sample. (RR2:152-59, 163-64). Off. Lom had been trained to never allow any fluids to enter a suspect's body before blood is drawn, pointing out that officers received similar training on breath intoxilyzers, not because it had been proven that water or other substances affected the results, but because a defendant might later claim that contamination invalidated the results. (RR2:168-69). And if a suspect was receiving medical treatment, "...there's no power in the face of the earth..." that allowed an officer to order medical personnel to stop treatment until officers obtained a search warrant. (RR2:169). When Off. Lom returned to his duties after assisting Off. Torres with the blood-draw, Garcia was still being treated in the ER. (RR2:155-56, 158).

On examination by defense counsel and the trial court, Off. Lom agreed that he did not call the magistrate he thought might be on duty that night, that although he did not have medical training, he knew that the administration of an I.V. could dilute BAC, that he might have been able to ask medical personnel about Garcia's specific medical treatment and whether an I.V. would be administered, that he did

not know what type of substance was inside the I.V. bag, and that he did not see the nurse swab Garcia's arm in preparation for a needle. (RR2:161-62, 164-67, 175-77, 185-86).

Squeezing into a curtained area approximately 5-10 feet from Garcia and trying to stay out of the way of medical personnel in the crowded, hectic ER, Off. Torres saw 6-8 medical personnel cutting off Garcia's clothes, assessing Garcia, who appeared to be in pain, and connecting him to monitors. (RR3:76-78, 82, 125-26). When he saw a nurse organizing a "prep table" with an I.V. bag and bags containing tubing, Off. Torres, based on his experience at hospitals, believed that the nurse was about to administer an I.V. to Garcia–particularly when she removed the packaging from the tubing. (RR3:78-79, 82-83, 100-01, 127-28).

After Off. Torres's unsuccessful attempts to find out from medical personnel, who were focused only on providing treatment, whether an I.V. was imminent, Off. Lom approached and asked if he needed assistance. (RR3:79-81, 86). Because of their collective concern that the administration of an I.V. or medication was imminent, Off. Rodriguez, through Off. Lom, instructed Off. Torres to perform the blood-draw, which occurred at 3:17 a.m. (RR2:184); (RR3:81-83, 96-97, 102, 131, 139-40, 144-45); (SX3).

Adriana Gandara, the phlebotomist, testified that while she was waiting for Dr. Kavonian to finish examining Garcia so that she could draw blood, officers told her that they also needed blood drawn, but were waiting for "paperwork," although Gandara did not know what the "paperwork" was. (RR5:78-80, 82-83, 88-92, 94-97). Although Gandara testified that she initially waited in the ER for 10-15 minutes, then returned to her regular hospital duties, and was paged 20 minutes later to perform the blood-draw, (RR5:80-84, 98); (SX3), the record reflects that her recollection and 35-minute approximation of time is incorrect, as only 11 minutes transpired from the time Garcia was admitted at 3:06 a.m. and the blood was drawn at 3:17 a.m. (RR5:98).

Testing later revealed a BAC of .268 and the presence of cocaine metabolite. (RR3:69); (SX15-16). On cross-examination, Off. Torres, knowing that a nonconsensual blood-draw ordinarily required a search warrant, opined that the imminent administration of an I.V., likely containing saline solution, constituted exigent circumstances. (RR3:97, 115). A former certified EMT-basic, Off. Torres knew that "[w]ater will dilute anything," even if he could not explain the science of that dilution. (RR3:97-100).

When Off. Lom–who Off. Rodriguez considered a "knowledgeable officer" with considerable experience working in hospitals–called at 3:10 a.m. to voice his

concerns that the administration of an I.V. and possibly medications was imminent, Off. Rodriguez, crediting those concerns, instructed him to tell Off. Torres to perform the blood-draw before anything was injected into Garcia. (RR3:174-75, 192-95, 216); (RR5:20, 26, 62-64, 67-68); (SX25). Off. Rodriguez understood exigent circumstances to encompass situations where issues beyond police control threatened the destruction of evidence. (RR5:61). As a DWI and drug-recognition officer, Off. Rodriguez knew that doctors attempt to stabilize and lower a patient's BAC by intravenously administering medications and saline solution. (RR3:190-92).

Because Offs. Lom and Torres did not have a blood kit, Off. Rodriguez left to take one to them, but by the time he arrived at Del Sol, Off. Torres had obtained a kit from another officer and performed the blood-draw. (RR3:109-10, 175, 193, 195-96, 216-17); (RR5:26, 47-48, 58, 64); (SX26:20-21). When Off. Rodriguez arrived at the hospital, one of the nurses told him that although Garcia had the right to refuse certain treatments, he would not be permitted to refuse medication or an I.V. if internal injuries were revealed on the CT scans. (RR3:176, 218-19). At 4:45 a.m., after his CT scans revealed no serious injuries, Garcia was released

into the custody of Off. Rodriguez, who transported him to the police station. (RR3:144, 176-78); (RR5:26); (SX2); (SX26:25).[14]

The State, relying on *Schmerber v. California*,[15] argued that Garcia's warrantless blood-draw was justified under the exigent-circumstances exception to the warrant requirement because the officers could have reasonably concluded that the delay necessary to complete the warrant process threatened the destruction of blood evidence under the circumstances, which, aside from the natural dissipation of alcohol in the blood, included: (1) the investigation of a three-fatality car crash, (2) Garcia's admittance to the ER for medical treatment and the possibility of losing valuable evidence on three intoxication-manslaughter counts, (3) the imminent administration of an I.V., which Dr. Kavonian, along with two veteran DWI-task-force officers, opined would dilute BAC and through which fluids, medications, and/or a blood transfusion could be administered, (4) Garcia's continued unavailability while being treated in the ER where any internal injuries revealed on the CT scans would require an I.V. and further medical treatment, (5) Off. Rodriguez's inability to even finish drafting the warrant before the

---

[14] Because the record indisputably reflects that Garcia received medical treatment, and Off. Rodriguez only testified, without elaborating, that he later learned that Garcia did not want "anything," Garcia's assertion that he "...had, in fact, refused to accept any kind of treatment," *see* (Appellee's brief at 11), is not supported by the record.

[15] 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).

administration of the I.V. was imminent, and (6) the unavailability of any expedited warrant procedure in El Paso County. (CR2:570-78); (RR7:11, 16, 18-22, 27-35, 41).

The trial court ultimately suppressed the blood-analysis evidence, (CR2:587); (RR7:56, 95, 107-08, 124), and in its oral findings of fact and conclusions of law, which spanned two separate hearings, the trial court found credible "...the testimony of the medical personnel, the fire department personnel, [and] the officers with regard to..." probable cause to obtain a blood-draw search warrant. (RR7:95-96). The trial court also found that Off. Rodriguez did in fact go to the PHRC and begin the process of obtaining a search (and arrest) warrant, but its finding that Off. Rodriguez left the crash scene at 1:45 or 1:46 a.m. is incorrect, as Off. Rodriguez did not even arrive at the scene until 1:52 a.m., and he left at 2:43 a.m. (RR5:24); (RR7:27, 30-31, 50, 96, 108); (RR8:9, 12); (SX14); (SX26:18).

Contrary to Garcia's assertions, at no point did the trial court expressly find not credible Offs. Lom's and Torres's "account of the facts" underlying their ultimate assessment or conclusion that exigent circumstances justified a warrantless blood-draw. *See* (Appellee's brief at 12, 14). Rather, all of the credibility "findings" highlighted by Garcia in his brief, *see* (Appellee's brief at

12, 14, 29-32), are repeatedly directed at Offs. Lom's and Torres' subjective belief, *assessment*, *conclusion*, "*determination in his mind*," and "*determination in their minds*," or the *reasonableness* thereof. (RR7:12-13, 50-57, 95-96, 104, 106-07, 124) (emphasis added); (RR8:12, 14).

To the extent it made any statements that, in isolation, sounded like some kind of blanket credibility finding, such as its "finding" that "[b]ased upon the evidence [the officers are] not credible," the trial court explained that what it found not credible was the officers' *subjective belief* that Garcia was set to receive an I.V. or their *subjective determination* that exigent circumstances existed. (RR7:50-51, 53-57, 106-07); (RR8:12, 14). For example:

> [Court]: Based upon the evidence they're not credible.
> [State]: So you're saying that they completely disregarded the law?
> * * *
> [Court]: I'm saying that they are not credible in making a *determination in their minds* that there were exigent circumstances to justify a warrantless blood draw. That's what I'm saying based upon the evidence....

(RR7:50) (emphasis added). The trial court clarified that it was not making a determination that the officers lied in their testimony, but that "...Officer Lom's and Officer Torres' testimony is not credible *with regards to their assessment and the reasonableness of their conclusion that exigent circumstances existed*." (RR7:56-57) (emphasis added).

The totality of the trial court's findings reflects that it accepted that Offs. Lom and Torres could see Andrade as she prepared Garcia for the administration of an I.V., but simply concluded that the officers' assessment, determination, or conclusion that exigent circumstances existed to justify a warrantless blood-draw was incorrect or unreasonable:

> ...Lom is basing his assessment on what he saw there at the hospital and so is Torres. (RR7:13).
>
> Well, what did [the officers] observe? Tell me, what did Lom testify to as he observed? A shaking of the head by the defendant and a person holding up a bag. That was it. (RR7:17).
>
> ...the fact that the guy, a defendant, is laying down and *[Off. Lom] sees him shaking his head and the person with the I.V. is going like this*. And that's it. There's no I.V. in her hand even. It's just a bag and he can't hear or see what's going on.... (RR7:50-51) (emphasis added).
>
> [Off. Lom] indicated that he – what he saw is what appeared to be a nurse holding an I.V. bag and the defendant shaking or nodding or shaking his head in the negative. He did not see a needle in her hand. The fact that that nurse is prepared to do an I.V., that's just routine in these types of calls. (RR7:102-03).[16]

That the trial court accepted the officers' testimony about what they observed in the emergency room is evidenced by the fact that even Garcia, on

---

[16] Although the trial court appeared to initially question whether the officers could see what was occurring in the "triage room," after the State pointed to the testimony of medical personnel, which the trial court credited, that Garcia was in a "cubby" and not a separate room and argued that the officers could only have known about the I.V. bag if one of them had seen it, the trial court accepted that Off. Lom saw a nurse standing by Garcia with an I.V. bag, but disagreed with Off. Lom's conclusions therefrom. (RR7:17, 19-20, 50-51); *see also* (RR3:213).

rehearing in the Eighth Court, stated that "[w]hile Officer Lom did in fact see an I.V. bag, he did not see a needle, and he did see Garcia shake his head to refuse treatment." *See* (Appellee's motion for rehearing at 5-6).

SUMMARY OF THE STATE'S ARGUMENTS

Summary of the State's reply to Garcia's first issue: The complained-of purported fact findings by the trial court were entitled to no deference because they were: (1) not supported by any competent evidence in the record, (2) not relevant to, or dispositive of, the exigent-circumstances analysis, and (3) legal conclusions, couched as credibility-based fact findings, that are subject to *de novo* review. Consequently, the Eighth Court properly applied the standard of review in disregarding unsupported and irrelevant fact findings and reviewing *de novo* the trial court's application of the law to any relevant and supported fact findings, specifically, whether the officers' actions were objectively reasonable under the Fourth Amendment. And the Eighth Court did not err in reversing the trial court's suppression order where the warrantless blood-draw was supported by probable cause and justified by exigent circumstances.

Summary of the State's reply to Garcia's second issue:

The Eighth Court did not merely hold that exigent circumstances existed because of the unpredictable nature of the cocaine metabolite in Garcia's blood. Rather, the crux of the Eighth Court's holding, after making the unremarkable distinction between the alleged intoxicants in *Cole* and this case, was that the introduction of intravenous saline solution or other medication, particularly

narcotic medication, would threaten or destroy the integrity of any blood sample, and this would hold true regardless of what intoxicant was present in Garcia's blood. Where defendants routinely challenge the reliability of blood-analysis results on the grounds of contamination and where the State undoubtedly has a substantial interest in securing the best, unadulterated evidence of a defendant's level of intoxication, maintaining the integrity of a blood sample–evidence in a criminal case–by preventing it from becoming commingled with non-naturally-occurring substances, such as intravenous saline solution and narcotics medication, is particularly important. For these reasons, whatever intoxicants were present in Garcia's blood, the Eighth Court correctly held that the introduction of saline solution or other unknown substances, particularly narcotic medication, constituted an exigency that justified Garcia's warrantless blood-draw.

STATE'S REPLIES TO APPELLEE'S ISSUE PRESENTED

REPLY TO ISSUE ONE: The Eighth Court of Appeals gave the appropriate level of deference to the trial court's findings of fact and properly disregarded purported fact findings that were: (1) not supported by the record, (2) not relevant to, or dispositive of, the exigent-circumstances analysis, and (3) legal conclusions, couched as credibility-based fact findings, that were subject to *de novo* review. And the Eighth Court did not err in reversing the trial court's suppression order where probable cause for the blood-draw existed, and exigent circumstances requiring immediate police action made obtaining a search warrant impracticable.

UNDERLYING FACTS

The State here relies on and adopts the recitation of facts set out in the statement of facts above.

ARGUMENT AND AUTHORITIES

In his first ground accepted for review, Garcia asserts that the Eighth Court erroneously applied a *de novo* review that failed to account for the trial court's findings of fact, specifically, the trial court's alleged findings that: (1) "...[Garcia] was *not* going to be injected with an I.V.;" (2) "...Officers Lom and Torres were not credible;" and (3) "...the theory that the blood would be compromised by the I.V. was entirely speculative and had no basis or evidence to support it." *See* (Appellee's PDR brief at 19-36) (emphasis in original).

I. Applicable law on the exigent-circumstances exception to the Fourth Amendment's warrant requirement in the context of warrantless blood-draws

Because the touchstone of the Fourth Amendment is reasonableness, the warrant requirement of the Fourth Amendment, which only guards against unreasonable warrantless searches and seizures, is subject to certain reasonable exceptions. *See Missouri v. McNeely*, 569 U.S. 141, 148, 133 S.Ct. 1552, 1558, 185 L.Ed.2d 696 (2013); *Kentucky v. King*, 563 U.S. 452, 459, 131 S.Ct. 1849, 1856, 179 L.Ed.2d 865 (2011); *Brigham City v. Stuart*, 547 U.S. 398, 403, 126 S.Ct. 1943, 1947, 164 L.Ed.2d 650 (2006); *see also* U.S. CONST. amend. IV. Under the well-recognized exigent-circumstances exception, a warrantless search is objectively reasonable under the Fourth Amendment when necessary to prevent the imminent destruction of evidence. *See McNeely*, 569 U.S. at 148-49; *King*, 563 U.S. at 460. When a defendant moves to suppress evidence based on a warrantless search, the State has the burden of showing that probable cause existed at the time the search was made and that exigent circumstances requiring immediate police action made obtaining a warrant impracticable. *See Turrubiate v. State*, 399 S.W.3d 147, 151 (Tex.Crim.App. 2013).

In *Schmerber v. California*, an officer at the scene of a car crash involving defendant's vehicle observed the defendant displaying signs of intoxication. *See*

Schmerber, 384 U.S. at 768-69. Within two hours of the crash, the officer arrested the defendant at a hospital where the defendant was receiving treatment for injuries he sustained in the crash. *See id*. at 758, 769. At the hospital, the officer directed a physician to take a blood sample from the defendant over his refusal and without a warrant. *See id*. at 758.

The U.S. Supreme Court, recognizing that "[t]he importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great," nevertheless upheld the nonconsensual, warrantless blood-draw based on the existence of exigent circumstances that made obtaining a warrant impracticable, specifically: (1) the natural dissipation of alcohol in the body after drinking stops, and (2) the lack of time to obtain a warrant because of time spent taking the defendant to the hospital and investigating the crash scene. *See id*. at 770-71; *Weems v. State*, 493 S.W.3d 574, 579 (Tex.Crim.App. 2016).

And in *McNeely*, the U.S. Supreme Court, while declining to recognize the natural dissipation of alcohol as a *per se* exigency justifying a warrantless blood-draw, reaffirmed its holding in *Schmerber* that a nonconsensual, warrantless blood-draw is constitutionally valid when exigent circumstances requiring immediate police action make obtaining a warrant impracticable. *See*, *e.g.*,

McNeely, 569 U.S. at 150-52; *see also King*, 563 U.S. at 460 n.3. In so holding, the Court recognized that "...because an individual's alcohol level gradually declines soon after he stops drinking, a significant delay in testing will negatively affect the probative value of the results." *See McNeely*, 569 U.S. at 152; *see also Cole v. State*, 490 S.W.3d 918, 924 (Tex.Crim.App. 2016) (explaining that the *McNeely* Court still recognized the gravity of the body's natural metabolic process and the attendant evidence destruction over time).

This Court has also recently upheld a nonconsensual, warrantless blood-draw where the totality of the circumstances reflected that: (1) the accident's severity and block-long debris field it created necessitated the lead investigating officer's three-hour investigation of the crash scene; (2) only after the lead investigating officer measured, calculated, and assessed the vehicles' damage was he able to form probable cause to believe the defendant was responsible for the crash and the victim's death; (3) because he was the only available officer capable of performing the accident investigation, the lead investigating officer's continued presence at the scene was vital and prevented him from leaving to obtain a warrant; (4) the accident scene's location and the public-safety danger required a number of officers at the scene to perform necessary responsibilities, and taking any one of them away would have left a necessary duty unfulfilled; (5) even if the

lead investigating officer had attempted to secure a warrant from an on-call magistrate, the issuance of a warrant would have taken an hour to an hour-and-a-half, at best; (6) the officer was reasonably concerned that both potential medical intervention performed at the hospital and the natural dissipation of methamphetamine in the defendant's body would adversely affect the reliability of his blood sample; (7) where the defendant had complained of having "pain all over," the officer was reasonably concerned that the administration of pain medication, specifically narcotics, would affect the blood sample's integrity; and (8) without a known elimination rate of methamphetamine, law enforcement faced inevitable evidence destruction without the ability to know–unlike alcohol's widely accepted elimination rate–how much evidence it was losing as time passed. *See Cole*, 490 S.W.3d at 925-27.

II. Applicable standards of review

A. Standard for reviewing rulings on motions to suppress

A reviewing court should review a trial court's suppression ruling under a bifurcated standard of review. *See St. George v. State*, 237 S.W.3d 720, 725 (Tex.Crim.App. 2007). The reviewing court should not engage in its own factual review, as the trial judge is the sole trier of fact and judge of credibility of the witnesses and the weight to be given to their testimony. *See id*. Rather, the

reviewing court should give almost total deference to the trial court's rulings on: (1) questions of historical fact, and (2) application-of-law-to-fact questions that turn on an evaluation of credibility and demeanor, so long as those findings are supported by the record. *See St. George*, 237 S.W.3d at 725; *Guzman v. State*, 955 S.W.2d 85, 89 (Tex.Crim.App. 1997). If the resolution of the substantive issue does not "turn" on the evaluation of credibility and demeanor, *de novo* review is appropriate. *See Abney v. State*, 394 S.W.3d 542, 547 (Tex.Crim.App. 2013); *Guzman*, 955 S.W.2d at 89. The fact that credibility and demeanor are important factors in the trial court's assessment does not always mean that the question "turns" on an evaluation of credibility and demeanor. *See Abney*, 394 S.W.3d at 547. Instead, a question "turns" on an evaluation of credibility and demeanor "when the testimony of one or more witnesses, if believed, is *always* enough to add up to what is needed to decide the substantive issue." *See id*., *quoting Loserth v. State*, 963 S.W.2d 770, 773 (Tex.Crim.App. 1998) (emphasis in original). "There is a sense in which all appellate review of mixed questions of law and fact are ultimately *de novo*–but only after the appellate court has first deferred to the trial court's resolution...of any material issue of historical fact or witness credibility, then measuring the facts, as so resolved, against the determinative legal

standard." *See Johnson v. State*, 414 S.W.3d 184, 197 (Tex.Crim.App. 2012) (Price, J., concurring).

And if a reviewing court is not required to defer to trial-court findings that are not supported by the record, *see Miller v. State*, 393 S.W.3d 255, 263 (Tex.Crim.App. 2012) ("...deference is due only if the trial court's rulings are supported by the record"), or are contradicted by conclusive or indisputable evidence, *see Tucker v. State*, 369 S.W.3d 179, 187 (Tex.Crim.App. 2012) (Alcala, J., concurring) (trial court's findings that are inconsistent with conclusive evidence, such as a written and signed agreed stipulation of evidence or indisputable video evidence, may be disregarded as unsupported by the record), then it reasonably follows that illogical or nonsensical trial-court findings may also be disregarded on appeal, since such findings are unsupported by any reasonable inference from the evidence.

Additionally, a trial court cannot insulate its ruling from appellate review by characterizing the substantive question as one that necessarily turns on an evaluation of credibility. *See State v. Mechler*, 153 S.W.3d 435, 439 (Tex.Crim.App. 2005) (holding that a statement in a trial judge's fact findings regarding the role witness credibility played in its decision cannot determine an appellate court's standard of review and cannot grant the trial court the ability to

control how its rulings will be reviewed). And that an appellate court does not ultimately accept or rely upon a trial court's findings that are unsupported by the record, are irrelevant to the substantive issue, or are not truly credibility-based fact findings at all does not mean that an appellate court is necessarily conducting a *de novo* review because "'[*d*]*e novo*' means that an appellate court affords no deference to the lower court's determination and the appellate court considers the matter as if it was the court of first instance." *See Tucker*, 369 S.W.3d at 187 (Alcala, J., concurring), *citing* BLACK'S LAW DICTIONARY 864 (2004).

B. Standard for reviewing the reasonableness of an officer's action under search-and-seizure law

This Court has held that "[w]hether a specific search or seizure was reasonable is a mixed question of law and fact and is conducted *de novo*." *See St. George*, 237 S.W.3d at 725. A reviewing court should examine the totality of the circumstances in determining whether law enforcement faced an emergency that justified acting without a warrant. *See McNeely*, 569 U.S. at 149; *Cole*, 490 S.W.3d at 923. An exigent-circumstances analysis requires the application of an objective standard of reasonableness, taking into account the facts reasonably available to the officer at the time of the search. *See Cole*, 490 S.W.3d at 923.

And this objective standard of reasonableness disregards the officer's *subjective* beliefs, reasoning, conclusions, and motivations and looks only to whether the circumstances, viewed *objectively*, justify the police action. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 736, 131 S.Ct. 2074, 2080, 179 L.Ed.2d 1149 (2011); *King*, 563 U.S. 452; *Brigham*, 547 U.S. at 404 (holding that the officer's subjective motivation is irrelevant and the officer's action is reasonable under the Fourth Amendment, regardless of the individual officer's state of mind, as long as the circumstances, viewed objectively, justify the action); *Scott v. United States*, 436 U.S. 128, 138, 98 S.Ct. 1717, 1723, 56 L.Ed.2d 168 (1978) ("...the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action."); *State v. Ortiz*, 382 S.W.3d 367, 372-73 (Tex.Crim.App. 2012) (disregarding the officer's subjective beliefs in Fourth-Amendment-reasonableness analysis).[17] Moreover, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments–in

[17] Thus, even if a trial court finds not credible an officer's testimony that he subjectively (actually) believed that exigent circumstances justified a warrantless blood-draw, the fact that a reviewing court declines to hold such a credibility finding dispositive of the exigent-circumstances analysis–where such a finding is irrelevant and non-dispositive to the ultimate issue–does not mean that the reviewing court employed a *de novo* review that failed to afford proper deference to the trial court's findings.

circumstances that are tense, uncertain, and rapidly evolving...." *See King*, 563 U.S. at 466, *quoting Graham v. Connor*, 490 U.S. 386, 396-97, 109 S.Ct. 1865, 1872, 104 L.Ed.2d 443 (1989); *see also Johnson v. State*, 171 S.W.3d 643, 649 (Tex.App.–Houston [14th Dist.] 2006, pet. ref'd) ("[W]e should not casually second-guess the officers' conduct from the relative tranquility of our chambers.").

III. The Eighth Court gave the appropriate level of deference to the trial court's findings of fact and properly disregarded fact findings that were: (1) not supported by the record, (2) not relevant to, or dispositive of, the exigent-circumstances analysis, or (3) legal conclusions, couched as credibility-based fact findings, that were subject to *de novo* review.

By limiting its analysis to only those specific "findings" that Garcia alleges the Eighth Court failed to afford proper deference, the State does not agree or concede that the Eighth Court's holding that exigent circumstances justified the warrantless blood-draw was predicated entirely on only those facts showing the imminent administration of an I.V. Though seemingly engaging initially in a prohibited "divide-and-conquer" analysis of the circumstances supporting the exigent-circumstances determination, *see United States v. Arvizu*, 534 U.S. 266, 273, 122 S.Ct. 744, 750-51, 151 L.Ed.2d 740 (2002); *Wiede v. State*, 214 S.W.3d 17, 25 (Tex.Crim.App. 2007) (cases prohibiting a piecemeal or "divide-and-conquer" analysis where a totality-of-the-circumstances test is required), the Eighth Court properly considered the totality of the circumstances in concluding

that exigent circumstances existed, specifically, the imminent administration of an I.V., through which unknown foreign substances would likely compromise the reliability of test results of whatever intoxicant was present in Garcia's blood, *and* that "Garcia's accident resulted in three deaths, several cars afire, and the necessity of numerous officers on the scene." *See Garcia*, 2017 WL 728367 at *12.

A. The trial court's purported findings that "...Officers Lom and Torres were not credible" were entitled to no deference because they were: (1) not supported by the record, (2) not relevant to, or dispositive of, the exigent- circumstances analysis, and (3) legal conclusions, couched as credibility-based fact findings, that were subject to *de novo* review.

In his brief, Garcia alleges that the Eighth Court must have conducted a *de novo* review because it failed to defer to the trial court's express finding that "...Officers Lom and Torres were not credible." *See* (Appellee's PDR brief at 24-25, 28-32). As previously discussed, the record reflects that the trial court did not make a blanket, adverse credibility finding with respect to the officers' testimony or Offs. Lom's and Torres's accounting of events underlying their ultimate assessment or conclusion that exigent circumstances justified a warrantless blood-draw. In fact, the trial court expressly found the officers' testimony credible with respect to the development of probable cause, (RR7:95-96), and that Off.

Rodriguez did in fact go to the PHRC and begin the process of obtaining a search (and arrest) warrant. (RR7:27, 50, 96, 108); (RR8:9).

And the totality of the trial court's findings reflects that it accepted that Offs. Lom and Torres could see Andrade as she prepared Garcia for the administration of an I.V. (RR7:13, 17, 50-51, 102-03). *See State v. Duran*, 396 S.W.3d 563, 566-67 (Tex.Crim.App. 2013) ("A reviewing court must apply the same non-technical, common-sense deference–not only to the trial judge's individual factual findings, but also to the totality of those findings–that it uses to assess a magistrate's determination of probable cause."). That is certainly understandable since the fact that the officers observed Andrade preparing Garcia for an I.V. was also established circumstantially through Andrade's credible testimony, in which she testified that she could see the officers while she was preparing Garcia for the I.V. and agreed that "...[the officers] were able to see what [she was] were doing...." (RR2:94-95).[18] *See Duran*, 396 S.W.3d at 566-67.[19]

---

[18] Additionally, the trial court credited the testimony of medical personnel that they did not communicate with the officers regarding Garcia's medical treatment and the administration of an I.V., such that the officers could only have known about the I.V. bag and equipment if they had observed it.

[19] Again, on rehearing in the Eighth Court, Garcia himself acknowledged that Off. Lom saw the I.V. bag. *See* (Appellee's motion for rehearing at 5-6).

Under these circumstances, the Eighth Court did not err in not inferring an adverse credibility finding that contradicts the trial court's acceptance that Off. Lom saw Andrade prep Garcia for an I.V. *See State v. Sheppard*, 271 S.W.3d 281, 286 (Tex.Crim.App. 2008) (holding that a reviewing court should not imply new or different factual findings when the trial court has found an explicit fact).[20]

The record further reflects that to the extent the trial court made adverse credibility "findings," they were directed at the officers' subjective belief, subjective determination, assessment, or conclusion that exigent circumstances existed. If an officer's subjective beliefs, reasons, motivations, or determinations are not relevant to, or dispositive of, an exigent-circumstances analysis, *see Brigham*, 547 U.S. at 4.04; *Scott*, 436 U.S. at 138; *Ortiz*, 382 S.W.3d at 372-73, then, by logical extension, a trial court's findings on the officer's subjective beliefs, reasons, motivations, or determinations, credibility-based or otherwise, are also not relevant or dispositive of the issue. And if there was any question as to whether it was reasonable that the officers believed that Garcia would receive an

---

[20] As the State argued at the suppression hearing, (RR7:16-17, 21), even assuming, *arguendo*, that the officers' perception of what was occurring in the ER was somehow mistaken, which the State does not concede, a reasonable mistake of fact does not invalidate the blood-draw or demonstrate a Fourth Amendment violation. *See Robinson*, 377 S.W.3d at 720-21. "This is so because a mistake about the facts, *if* reasonable, will not vitiate an officer's actions in hindsight so long as his actions were lawful under the facts as he reasonably, albeit mistakenly, perceived them to be." *See id*. at 720-21 (emphasis in original).

I.V., Dr. Kavonian answered that question when he opined that a person observing the I.V. bag and equipment could reasonably assume that the patient would receive an I.V.

In other words, that a trial court deems an assertion of "fact" to be relevant to, or dispositive of, the issue does not necessarily make it so. For example, the Eighth Court may afford deference to all of the trial court's fact findings that pertained to the legality of Garcia's statements, but those fact determinations are simply not relevant to the issue of whether exigent circumstances justified a warrantless blood-draw. That the Eighth Court did not find such fact findings relevant or dispositive does not necessarily mean that it engaged in a *de novo* review that failed to afford deference to any of the trial court's findings. Rather, the Eighth Court simply resolved the legal issue by applying the law to only those trial-court fact findings that are relevant and/or dispositive of the ultimate legal conclusion.

Moreover, the question of whether the officers' *conclusion* that exigent circumstances necessitated or justified a warrantless blood-draw was reasonable is a legal question, *see Robinson v. State*, 377 S.W.3d 712, 719 n.22 (Tex.Crim.App. 2012); *White v. State*, 201 S.W.3d 233, 240 (Tex.App.–Fort Worth 2006, pet. ref'd), and a trial court cannot transform a legal question into a factual question

that turns on an evaluation of credibility or dictate how an appellate court will review its ruling by characterizing a legal conclusion as a factual, credibility determination. *See Mechler*, S.W.3d at 439.

And contrary to Garcia's assertions, that this Court ultimately agreed with the trial court's findings and conclusions in *Cole*–that the investigating officer was reasonably concerned that potential medical intervention and the natural dissipation of methamphetamine in the defendant's body would adversely affect the reliability of testing of his blood sample and also that the administration of pain medication, specifically narcotics, would affect the blood sample's integrity–does not mean that this Court necessarily held: (1) that the issue of whether an officer's actions are objectively reasonable is a factual, rather than legal, determination that is afforded almost total deference, or (2) that an officer's subjective belief or concern (and thus a trial court's fact finding based thereon) is relevant or dispositive of whether a search was objectively reasonable. *See* (Appellee's brief at 23-24, 28-29, 32). Rather, this Court upheld the blood-draw in *Cole* because, under an objective standard that disregards an officer's subjective beliefs and state of mind, a reasonable officer standing in the shoes of the officer in *Cole*, facing the same set of circumstances, could reasonably conclude that the possibility that medical intervention, including the administration of medication,

could adversely affect the blood-sample's reliability and integrity justified a warrantless search under the exigent-circumstances exception. *See Cole*, 490 S.W.3d at 923 ("An exigent circumstances analysis requires an *objective* evaluation of the facts reasonably available to the officer at the time of the search.") (emphasis added).

For all the foregoing reasons, the Eighth Court gave the appropriate level of deference to the trial court's findings of fact and properly disregarded fact findings that were: (1) not supported by the record, (2) not relevant to, or dispositive of, the exigent-circumstances analysis, or (3) legal conclusions, couched as credibility-based fact findings, that were subject to *de novo* review, and this portion of Garcia's first ground should be overruled.

B. The trial court's purported findings that Garcia was not going to be injected with an I.V. were entitled to no deference because they were not supported by the record and were not relevant to, or dispositive of, the exigent-circumstances analysis.

Garcia additionally argues that the Eighth Court must have employed a *de novo* review that failed to defer to the trial court's findings because it did not find dispositive the trial court's finding that "...[Garcia] was *not* going to be injected with an I.V." *See* (Appellee's brief at 25-28) (emphasis added).

To the extent the trial court made any express fact finding that the evidence showed that Dr. Kavonian decided at the outset of Garcia's treatment that he was "*never*" going to be injected with I.V. solutions or medications as part of his ER treatment, such a finding is not supported by the record.[21] While Andrade testified that a decision was ultimately made not to administer an I.V., (RR2:97, 99), Dr. Kavonian, the person who actually made that decision, merely told his staff to hold off on the I.V. at that time because of safety concerns due to Garcia's combativeness. (RR2:122). And even the trial court recognized that, at the time of the blood-draw, Garcia was still set to receive diagnostic testing, such as a CT scan, to rule out internal injuries necessitating further treatment. (RR7:23, 101).

Even if the record did somehow support a fact finding that, at the time of the blood-draw, medical personnel had decided that Garcia was *never* going to receive an I.V., no matter what internal injuries the CT scan might later reveal, such a fact would still not be dispositive of the exigent-circumstances analysis because the reasonableness of an officer's actions is gauged by facts that are reasonably available to the officer at the time of the search, *see Cole*, 490 S.W.3d

---

[21] Although Garcia alleges, and the trial court repeatedly found, that he (Garcia) refused or did not receive medical treatment, the record plainly reflects that Garcia only selectively declined procedures that involved piercing his vein (a fact not conveyed to the officers) and that he was in fact medically treated when he was evaluated by a physician, submitted to diagnostic testing, and was subsequently discharged from the ER at 4:20 a.m.

at 923, and the undisputed testimony of medical personnel was that none of them communicated with the officers about their plans for Garcia's treatment.[22]

And any determination that no exigency existed on the basis of information that came to light *after* the blood-draw, such as the fact that Dr. Kavonian ultimately did not reverse his previous decision to delay the administration of an I.V., erroneously judges the reasonableness of the officers' actions with the 20/20 vision of hindsight, rather than carefully applying an objective standard that looks only to the facts and circumstances known to the police at the time of the search. *See McNeely*, 569 U.S. at 158 n.7 (officers' judgments should be assessed "from the perspective of a reasonable officer on the scene, rather than with the 20/20

---

[22] And officers should not be required to question medical personnel about Garcia's medical treatment, even though the officers here tried to, because, aside from the fact that such a requirement might delay the timely administration of life-saving treatment: (1) federal and state medical privacy laws limit information that may be disclosed about a person's medical condition and treatment without the person's written consent, and (2) the officers could not predict whether Garcia would be available for a blood-draw where Garcia's medical diagnosis and treatment (including his refusal and consent thereto) was evolving by the second. *See State v. Stavish*, 868 N.W.2d 670, 679 (Minn. 2015), *citing* 45 C.F.R. § 160.103; 45 C.F.R. § 164.512(f) (privacy protections under the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA)); *see also* TEX. OCC. CODE §§ 159.002(a)-(b), (f), 159.003(a)(10), (c) (concerning the disclosure of information regarding medical treatment by a physician); TEX. HEALTH & SAFETY CODE §§ 773.091(a)-(b), (d), 773.092(a)(6), (d) (concerning the disclosure of information regarding treatment by EMS). And Dr. Kavonian agreed that it would have been absurd and unprecedented for an officer to enter the treatment area and stop and question medical personnel about a patient's treatment. (RR2:137-38). And although Off. Lom agreed with the trial court's assertion that he might have been able to ask about Garcia's course of treatment, (RR2:175-76), there is no evidence that medical personnel would have disclosed information about Garcia's treatment for law-enforcement purposes.

vision of hindsight"); *Cole*, 490 S.W.3d at 925; *People v. Ackerman*, 346 P.3d 61, 66-67 (Colo. 2015) (holding that the trial court failed to properly consider all relevant facts, and thus erred in concluding that no exigency existed, where it knew, with the benefit of hindsight, when approximately the defendant became unavailable for a blood-draw because he underwent surgery and discounted the fact that the police, unlike the trial court, only learned of the defendant's impending surgery shortly before it was to begin).

For all the foregoing reasons, the Eighth Court gave the appropriate level of deference to the trial court's findings of fact and properly disregarded fact findings that were not supported by the record and were not relevant to, or dispositive of, the exigent-circumstances analysis, and this portion of Garcia's first ground should also be overruled.

C. The trial court's purported findings that the evidence did not support the conclusion that Garcia's blood would be compromised by an I.V. were entitled to no deference because they were not supported by the record and were not relevant to, or dispositive, of the exigent-circumstances analysis.

Garcia further argues that the Eighth Court employed a *de novo* review that failed to defer to the trial court's findings because it did not find dispositive the trial court's finding that "...the theory that the blood would be compromised by the

I.V. was entirely speculative and had no basis or evidence to support it." *See* (Appellee's brief at 32-36).

Any fact findings in this regard were not supported by the record because, even if the trial court chose to discredit the officers' testimony, the fact that saline solution and other substances injected in Garcia's body would adversely affect the reliability and integrity of any blood sample was established circumstantially through the credible testimony of Dr. Kavonian, who opined that I.V. fluids would dilute a patient's BAC. Dr. Kavonian and Andrade explained that fluids, pain medications, sedatives, medications to anesthetize a patient, and a blood transfusion could be administered through an I.V. line.

While Garcia now seeks to discredit Dr. Kavonian's testimony by attaching a purported "leading study" to his brief that addresses only the effect of saline solution, and not medications, on a defendant's BAC, he did not present or cite this study to the trial court, and he has cited no authority that has ever accepted this study as the leading authority on the matter. *See Luckenbach v. State*, 523 S.W.3d 849, 857 (Tex.App.–Houston [14th Dist.] 2017, no pet.) (declining to consider on appeal a study that was not cited or presented to the trial court). And Garcia's study does not demonstrate that an officer's belief, that intravenous saline solution would affect a defendant's BAC in a way that undermines its evidentiary

value, would be objectively unreasonable where, by Garcia's own admission, the prevailing belief in the medical community is that intravenous saline solution can help "sober up the patient more quickly," *see* (Appellee's brief at 34-35), and officers–non-medical professionals–cannot be expected to second-guess prevailing medical standards. Off. Rodriguez's knowledge that doctors attempt to stabilize and lower a patient's BAC by intravenously administering medications and saline solution, (RR3:190-92), is consistent with what Garcia has acknowledged is common practice in ERs across the country.

For all the foregoing reasons, the Eighth Court gave the appropriate level of deference to the trial court's findings of fact and properly disregarded fact findings that were not supported by the record and were not relevant to, or dispositive of, the ultimate legal issue, and this portion of Garcia's first ground should be overruled.

IV. The Eighth Court did not err in reversing the trial court's suppression order where probable cause for the blood-draw existed, and exigent circumstances requiring immediate police action made obtaining a search warrant impracticable.

Employing an objective standard that disregards the subjective conclusions or intent of the officers, it was objectively reasonable for Offs. Rodriguez, Lom, and Torres to conclude that a warrantless blood-draw was justified where they

were faced with not only the affirmative contamination of Garcia's blood sample (rather than mere destruction of evidence through natural dissipation) through what they reasonably perceived to be the imminent intravenous introduction of unknown, foreign, and unpredictable substances into Garcia's blood, but also with additional circumstances that, along with evidence destruction attendant to natural dissipation of alcohol in the blood, made it impracticable for the officers to obtain a warrant before searching Garcia's blood:[23]

- The approximate one-hour delay, from approximately 1:46 a.m. (time of the crash) until 2:40 to 2:45 a.m. (time when Off. Torres left with Garcia in the ambulance and Off. Rodriguez left to get a warrant),[24] necessary for officers on the scene, such as Off. Torres, who was initially tasked with controlling bystanders, separating witnesses, and obtaining vehicle information, and Off. Rodriguez, who had to conduct a preliminary investigation to develop the requisite probable cause, to investigate and control the "chaotic" and "hectic" scene of a three-fatality car crash in which Garcia struck the

---

[23] Garcia does not challenge that probable cause existed for the blood-draw. Evidence that numerous witnesses observed Garcia exhibiting signs of intoxication, such as bloodshot eyes, the odor of alcohol, and slurred speech, (RR2:23, 43, 64, 120); (RR3:155, 159, 181); (RR5:71-73), that Off. Rodriguez opined that Garcia was intoxicated, (RR3:159); (RR7:95); and that Garcia admitted that he drank "...about three or four beers" and that he was the driver of the vehicle that caused a crash resulting in three fatalities, (RR3:160-61, 186, 198, 220), sufficiently established probable cause for Off. Rodriguez to reasonably believe that evidence of a crime would be found in Garcia's blood. *See Gattis v. State*, Nos. 14-03-00045-CR, 14-03-00046-CR, 2004 WL 2358455 at *4 (Tex.App.–Houston [14th Dist.], Oct. 21, 2004, no pet.) (not designated for publication) (finding probable cause for DWI and intoxication manslaughter under similar facts).

[24] The trial court's initial finding that Off. Rodriguez left the scene an hour earlier at 1:45 or 1:46 a.m.–the same time that first responders were even dispatched to the crash scene–to prepare a search warrant is incorrect and unsupported by the record. (RR5:24); (RR7:27, 30-31); (RR8:9); (SX14); (SX26:18).

victims' vehicle with such force that one passenger was ejected, Garcia's vehicle exploded into flames, and the victims' vehicle also burst into flames with two passengers trapped inside;[25]

- The delay caused by Garcia's attempts to thwart the investigation by telling Off. Rodriguez implausible stories and denying that he had operated a motor vehicle–a necessary element of both simple DWI and intoxication manslaughter–forcing Off. Rodriguez to expend valuable time to confirm with an eyewitness[26] that Garcia was in fact the driver;[27]

- Garcia's potential unavailability for a blood-draw for an unknown or indefinite period of time while receiving medical treatment, and Off. Rodriguez's inability, after experiencing several delays, to complete the entire 50-minute to 1-hour-and-15-minute warrant process before Garcia was admitted into the ER for emergency medical treatment at 3:06 a.m., which was only 23 minutes after Off. Rodriguez abruptly left the crash scene to get a warrant and a mere 13 minutes after he arrived at the PHRC;[28]

---

[25] *See Schmerber*, 384 U.S. at 770-71; *Cole*, 490 S.W.3d at 925-26; *Ackerman*, 346 P.3d at 68 ("While the complexity of an investigation alone may not justify an involuntary warrantless blood draw, such legitimate logistical challenges must be considered in evaluating exigency under the totality of the circumstances.").

[26] It matters not that another witness had already identified Garcia as the driver, as Off. Rodriguez was not required to immediately seek out a search warrant as soon as he acquired the bare minimum of evidence needed to possibly establish probable cause, particularly where Garcia's denials prompted Off. Rodriguez to confirm that he had the correct perpetrator. *See King*, 563 U.S. at 466-67.

[27] *See State v. Tullberg*, 857 N.W.2d 120, 133 (Wis. 2014) (finding exigent circumstances for warrantless blood-draw partly where defendant's false claims that he was not driving the vehicle involved in the crash required the officer to conduct additional investigation in order to determine who was driving the vehicle at the time of the crash), *cert. denied*, 135 S.Ct. 2327, 191 L.Ed.2d 981 (2015).

[28] *See*, *e.g.*, *Schmerber*, 384 U.S. at 770-71; *Stavish*, 868 N.W.2d at 678-80; *Tullberg*, 857 N.W.2d at 133-34 (finding exigent circumstances partly where the administration of a CT scan could have taken a considerable amount of time and revealed that defendant needed immediate subsequent medical treatment, which would have rendered defendant unavailable for an indefinite period of time); *Ackerman*, 346 P.3d at 68 (even if the trial court had been correct "that

- The potential for Garcia to be subjected to emergency medical treatment that would alter or contaminate his BAC or adversely affect the reliability of his blood-test results before Off. Rodriguez could complete the warrant process;[29]

- The apparent imminent administration of fluids and/or medications through an I.V. that would have diluted and contaminated Garcia's BAC–compromising the reliability and integrity of any blood sample–creating an emergency where *any* delay necessary in obtaining a warrant would have significantly undermined the efficacy of any subsequent blood-draw;[30]

- The unavailability of an expedited warrant process in El Paso County by which officers may obtain warrants by phone, email, or fax;[31] and

---

in the abstract there was enough time for police to obtain a warrant," such was a conclusion reached with the benefit of hindsight).

[29] *See Cole*, 490 S.W.3d at 926; *Ackerman*, 346 P.3d at 67 (finding exigent circumstances in part where the impending medical procedures might have altered the defendant's BAC and adversely affected the accuracy of the blood-analysis results).

[30] *State v. Peltz*, 391 P.3d 1215, 1225 (Ariz.Ct.App. 2017); *Cole*, 490 S.W.3d at 926; *State v. Fischer*, 875 N.W.2d 40, 46-48 (S.D. 2016); *Ackerman*, 346 P.3d at 67; *State v. Granger*, 761 S.E.2d 923, 928 (N.C.Ct.App. 2014); *State v. Keller*, No. 05-15-00919-CR, 2016 WL 4261068 at *5 (Tex.App.–Dallas, Aug. 11, 2016, no pet.) (mem. op.) (not designated for publication); *State v. Raymundo*, No. 71135-1-I, 187 Wash.App. 1005 at *4 (Wash.Ct.App., Apr. 20, 2015) (not designated for publication); *People v. Benedict*, No. C074198, 2014 WL 4257771 at *4 (Cal.Ct.App., Aug. 29, 2014, review denied) (not designated for publication) (cases finding exigent circumstances based partly on the potential administration of I.V. fluids and medications and where officers, who were not medical professionals, did not know whether such treatment would compromise or invalidate any blood-analysis results).

[31] *See McNeely*, 569 U.S. at 155 (recognizing that technological advances will not eliminate all delay from the warrant-application process because officers or prosecutors must still draft the warrants and magistrates must still review them, and telephonic and electronic warrants still require officers to follow time-consuming formalities).

- The gravity of the offense, specifically, three counts of intoxication manslaughter, because the stakes are simply higher.[32]

Even though he learned at 2:43 a.m. that Garcia was being transported to the ER, Off. Rodriguez *still* initiated steps to obtain a warrant until changed circumstances forced his hand. *See Ackerman*, 346 P.3d at 68. Off. Torres was tasked with accompanying Garcia to the hospital, freeing up Off. Rodriguez to immediately attempt to seek a warrant. And although an hour had transpired between the time first responders arrived on the scene and when Off. Rodriguez left at 2:43 a.m. to prepare a warrant at the PHRC, Garcia's unexpected request to be taken to the ER at approximately 2:43 a.m. and the apparent imminent

---

[32] In a dissenting opinion on the denial of the State's motion for rehearing in *State v. Villarreal*, Judge Yeary opined that the gravity of the offense and a defendant's status as a re-offender were also relevant considerations in an exigent-circumstances analysis. *State v. Villarreal*, 475 S.W.3d 784, 843 (Tex.Crim.App. 2015) (Yeary, J., dissenting op. on reh'g), *cert. denied*, 136 S.Ct. 2544, 195 L.Ed.2d 869 (2016); *see also Welsh v. Wisconsin*, 466 U.S. 740, 753, 104 S.Ct. 2091, 2099, 80 L.Ed.2d 732 (1984) (considering the gravity of the offense in an exigent-circumstances analysis). Specifically, Judge Yeary opined that "...the gravity of the recidivist's offense and his evident incorrigibility makes it all the more imperative that the best evidence of intoxication not be lost in the time it usually takes to secure a warrant." *See id*. (Yeary, J., dissenting). And the U.S. Supreme Court in *McNeely* did not foreclose the gravity of the offense as a factor in an exigent-circumstances analysis, explaining that because that case was argued on the broad proposition that drunk-driving cases present a *per se* exigency, it did not have an "...adequate analytic framework for a detailed discussion of all the relevant factors that can be taken into account in determining the reasonableness of acting without a warrant." *See McNeely*, 569 U.S. at 165.

In this case, not only does Garcia stand accused of committing the grave offense of three counts of intoxication manslaughter by killing three individuals in a fiery crash on Christmas Eve, he is also a recidivist, as Off. Rodriguez testified that Garcia was already in the system because he had been previously arrested for DWI.

administration of an I.V. at 3:10 a.m. changed the nature of the analysis in that, in light of those facts, the officers could have reasonably concluded that they were then faced with an emergency situation in which *any* further delay necessary to obtain a warrant would undermine the efficacy of any subsequent blood-draw. *See Stavish*, 868 N.W.2d at 680.

For all the foregoing reasons, probable cause existed at the time of Garcia's blood-draw, and under the totality of the circumstances, exigent circumstances made obtaining a search warrant impracticable, such that Garcia's blood-draw was justified under the exigent-circumstances exception to the Fourth Amendment warrant requirement. *See Schmerber*, 384 U.S. at 770-71; *Cole*, 490 S.W.3d at 925-27. Garcia's first ground for review should thus be overruled.

REPLY TO ISSUE TWO: Whatever intoxicants were present in Garcia's blood, the Eighth Court correctly held that the imminent introduction of saline solution or other unknown medications into Garcia's blood, particularly narcotic medication, constituted an exigency that justified Garcia's warrantless blood-draw.

UNDERLYING FACTS

The State here relies on and adopts the recitation of facts set out in the statement of facts above.

ARGUMENT AND AUTHORITIES

In his second ground accepted for review, Garcia asserts that the Eighth Court erred by basing its decision that exigent circumstances justified the warrantless blood-draw on evidence, specifically, cocaine intoxication, that was not known to the officers at the time of the warrantless blood-draw. *See* (Appellee's brief at 36-44).

I. Applicable law

As previously stated, a reviewing court should examine the totality of the circumstances in determining whether law enforcement faced an emergency that justified acting without a warrant. *See McNeely*, 569 U.S. at 149; *Cole*, 490 S.W.3d at 923. While the State agrees that an exigent-circumstances analysis "...requires an objective evaluation of the facts reasonably available to the officer at the time of the search," *see Cole*, 490 S.W.3d at 923, it does not agree that the

Eighth Court failed to limit its analysis to only those facts known to the officers at the time of the warrantless blood-draw.

II. Whatever intoxicants were present in Garcia's blood, the Eighth Court correctly held that the imminent introduction of saline solution or other unknown medications, particularly narcotic medication, into Garcia's blood constituted an exigency that justified Garcia's warrantless blood-draw.

The Eighth Court did not, as Garcia asserts, "...note[] that there was a concern that Appellee's 'intoxication was induced by alcohol *and cocaine metabolites*,'" *see* (Appellee's brief at 37) (emphasis in original), nor does it appear to have likened this case to *Cole* because cocaine, like methamphetamine, does not have a predictable and known elimination rate. Rather, the Eighth Court simply made a distinction between the alleged intoxicants in *Cole* and this case that was somewhat unnecessary to its ultimate holding that "[i]ntroducing intravenous saline or other medication, particularly narcotic medication, would likely compromise the blood sample by impeding the rate of dissipation." *See Garcia*, 2017 WL 728367 at *12. In other words, the exigency was not necessarily the unpredictability of how cocaine might dissipate in Garcia's blood, but rather, was the introduction of unknown adulterants, such as saline solution or medications–particularly narcotics–that would threaten or destroy the integrity of

any blood sample. And this would hold true no matter what intoxicant was present in Garcia's blood.

Where defendants routinely challenge the reliability of blood-analysis results on the grounds of contamination, *see State v. Neesley*, 239 S.W.3d 780, 782 (Tex.Crim.App. 2007) (addressing whether the mandatory-blood-draw statute permitted more than one blood-draw for a usable specimen where the first blood sample from the defendant, taken near an I.V. line, had been contaminated with intravenous saline solution); *Kennemur v. State*, 280 S.W.3d 305, 316 (Tex.App.–Amarillo 2008, pet. ref'd) (challenging the factual sufficiency of the evidence supporting defendant's conviction on the grounds that the EMT contaminated his blood sample by wiping his arm with an alcohol wipe prior to taking the blood sample), *cert. denied*, 556 U.S. 1191, 129 S.Ct. 2005, 173 L.Ed.2d 1101 (2009); *Arbanas v. State*, Nos. 05-14-01376-CR, 05-14-01377-CR, 2016 WL 1615592 at *4 (Tex.App.–Dallas, Apr. 20, 2016, pet. ref'd) (mem. op.) (not designated for publication) (challenging the reliability of blood-analysis results on grounds that lab technicians did not sufficiently testify about how the EMIT machine accounted for interferents such as isopropyl alcohol that may have contaminated the blood sample), *cert. denied*, 137 S.Ct. 694, 196 L.Ed.2d 529 (2017); *Russell v. State*, No. 14-15-00036-CR, 2016 WL 1402943 at *7 n.13

(Tex.App.–Houston [14th Dist.], Feb. 23, 2016, pet. ref'd) (mem. op.) (not designated for publication) (suggesting that blood-analysis results were unreliable where defendant's blood sample could have been contaminated by candida albicans, a yeast or bacteria that can, under certain conditions, create alcohol in a blood sample), *cert. denied*, 137 S.Ct. 835, 197 L.Ed.2d 70 (2017), and where the State undoubtedly has a substantial interest in securing the best, unadulterated evidence of a defendant's level of intoxication, *see Villarreal*, 475 S.W.3d at 857 (Yeary, J., dissenting) (recognizing evidence of a defendant's blood-alcohol level as the very best evidence of intoxication), maintaining the integrity of a blood sample–evidence in a criminal case–by preventing it from becoming commingled with non-naturally-occurring substances, such as intravenous saline solution and narcotics medication, is particularly important.

And it is this affirmative contamination of the blood sample, as well as the circumstances set out above that, in combination with the dissipation of alcohol, distinguishes this case from *McNeely*. *See* (Appellee's brief at 42). Garcia nevertheless argues that "...anyone taken to a hospital, given the *potential* of having substances injected to [sic] their body–despite how unreasonable and not credible that belief is–faces having their blood drawn without a warrant." *See id*. at 36. "Whether law enforcement face[s] an emergency that justifies acting

without a warrant calls for a case-by-case determination based on the totality of circumstances." *See Cole*, 490 S.W.3d at 923. And this is not a case where the administration of an I.V. was wholly speculative. What the officers observed was what Andrade testified to–that she came very close–feeling around Garcia's arm for a vein–to administering an I.V., through which any number of contaminating substances could have been injected into Garcia's blood stream. But even though Off. Rodriguez knew that Garcia was being transported to the ER, he *still* initiated steps to obtain a warrant until those rapidly changing circumstances forced his hand. *See Ackerman*, 346 P.3d at 68.

For all the foregoing reasons, whatever intoxicants were present in Garcia's blood, the Eighth Court correctly held that the imminent introduction of intravenous saline solution or other unknown medications, particularly narcotic medication, into Garcia's blood constituted an exigency that justified Garcia's warrantless blood-draw. Garcia's second ground for review should thus be overruled.

PRAYER

WHEREFORE, the State prays that this Court overrule Garcia's grounds presented for review and affirm the judgment of the Eighth Court of Appeals.

Respectfully submitted,

JAIME ESPARZA
DISTRICT ATTORNEY
34th JUDICIAL DISTRICT

/s/ Lily Stroud
LILY STROUD
ASST. DISTRICT ATTORNEY
DISTRICT ATTORNEY'S OFFICE
203 EL PASO COUNTY COURTHOUSE
500 E. SAN ANTONIO
EL PASO, TEXAS 79901
(915) 546-2059 ext. 3769
FAX (915) 533-5520
EMAIL lstroud@epcounty.com
SBN 24046929

ATTORNEYS FOR THE STATE

CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the foregoing document contains 12,966 words.

/s/ Lily Stroud
LILY STROUD

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on November 13, 2017, a copy of the foregoing brief was emailed, through an electronic-filing-service provider, to appellee's attorneys: T. Brent Mayr, bmayr@bmayrlaw.com, and Richard D. Esper, richardesperlaw@yahoo.com; and to the State Prosecuting Attorney, information@SPA.texas.gov.

/s/ Lily Stroud
LILY STROUD